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1975 No. 72, Original

In the Supreme Court of the United States

October Term, 1975

STATE OF SOUTH DAKOTA,
Plaintiff,

vs.

STATE OF NEBRASKA,
Defendant,

and

ROBERT J. FOLEY and PHYLLIS K. FOLEY, as joint tenants and their survivor, and HELEN ISAAK, as Executrix of the Estate of OTTO ISAAK, Deceased,
Intervenors.

REPORT OF THE SPECIAL MASTER

OREN HARRIS
Senior District Judge
Special Master

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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Intervenors.

REPORT OF THE SPECIAL MASTER

In this delayed action, the Special Master makes his report in accordance with the Order entered by the Supreme Court of the United States December 6, 1976. The delay in submitting a report is due primarily to the undertaking of substantial discovery by all the parties to the action. Additionally, each of the three attempts by the Master to schedule a hearing on the merits was met with an attempt by the parties to reach a settlement on the issue as to the present and future boundary between the States of South Dakota and Nebraska.

All of the parties have now entered into a stipulation of agreed facts and procedures for settlement of present

and future disputes and for the dismissal of this action. The Special Master, therefore, makes this Report to the Court with recommendation. The Stipulation is attached hereto and made a part of this Report by reference.

With the permission of the Court, the plaintiff, State of South Dakota, filed its complaint 1975 No. 72, Original, on October 4, 1976. On October 29, 1976, the defendant, State of Nebraska, filed its answer.

On November 22, 1976, Robert J. Foley, Phyllis K. Foley, and Otto Isaak filed a Motion for Leave to Intervene as defendants. By Order of the Supreme Court, an intervention was permitted to be filed on June 20, 1977. By Order filed December 22, 1977, there was a substitution of Helen Isaak as Executrix for the Estate of Otto Isaak.

The Special Master, by Order entered June 23, 1978, permitted an Amendment to the Complaint in Intervention filed by Intervenors. The Amendment states a claim of interest relating to the property which is the subject of this No. 72, Original litigation.

The primary dispute between the States of South Dakota and Nebraska, and the Intervenors pertains to property known as *Rush Island*. The State of South Dakota claims this property is within its boundaries. Its claim of title to the property appears to involve the division of school and public lands under the Constitution and statutes of the State of South Dakota. The State of Nebraska claims this property is within its boundaries.

In the Amended Complaint in Intervention, the Intervenors state the boundary between Cedar County, Nebraska and Yankton County, South Dakota was established as the middle of the channel of the Missouri River. They cite 13 U.S. Stat. at Large 47 (Passed April 19, 1864) as support for their contention. Intervenors claim the

described real estate in which they contend an interest is within the boundary and borders of the State of Nebraska.

The parties have had substantial discovery. They have benefited from depositions, interrogatories, the various pleadings, exhibits, and obviously, discussions among themselves. A Stipulation for Dismissal of the action was filed with the Master on September 24, 1981.

Also on September 24, 1981, a motion was filed with the Master to dismiss the action. This was based on stipulation signed by all the parties and an agreement of settlement terminating the dispute through agreement and compromise. The parties agreed to submit any future boundary disputes between the State of South Dakota and the State of Nebraska with respect to the particular lands involved (namely Rush Island) to a Joint State Boundary Commission.

The parties had submitted proposals for the purpose of an agreed judgment, but objections were noted on each proposal. Upon receipt of a Motion to Dismiss, together with Stipulation for Dismissal, the Master prepared and submitted a Proposed Judgment of Dismissal to all parties. This Judgment of Dismissal is satisfactory to and has been signed by all parties to this action.

Pursuant to Rule 9 of the Supreme Court Rules and Rule 53 of the Federal Rules of Civil Procedure, the Special Master submits a Judgment of Dismissal, which is based on the Stipulation for Dismissal and the Motion to Dismiss referred to herein.

Paragraph 5 of the Judgment of Dismissal provides: "That the Bill of Complaint filed by the State of South Dakota against the State of Nebraska initiating this action be and the same is hereby dismissed without prejudice, each party bearing its own costs."

The Special Master appointed by this Court recommends to the Court that this Report be accepted and this action be dismissed as agreed to by all parties.

Submitted this 22nd day of February, 1982.

OREN HARRIS
Special Master

APPENDIX

(Received and entered file, Feb. 4, 1982.
Oren Harris, Master)

IN THE
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STATE OF SOUTH DAKOTA,
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Defendant,

AND

ROBERT J. FOLEY and PHYLLIS K. FOLEY, as joint tenants and their survivor and HELEN ISAAK as executrix of the estate of OTTO ISAAK, Deceased,
Intervenors.

JUDGMENT OF DISMISSAL

This matter comes on before this Court by the Joint Motion to Dismiss and Stipulation for Dismissal by each of the parties hereto: the State of South Dakota, by and through its Attorney General, Mark Meierhenry; the State of Nebraska, by and through its Attorney General, Paul L. Douglas; the Intervenors, by and through themselves and their attorney, Everett A. Bogue; requesting the Court to dismiss the action based upon the agreements in the Stipulation of Dismissal.

IT IS THE FINDING OF THIS COURT THAT:

1. The parties have concluded that it is in the best interests of each of them to avoid litigation and multiple exercises of sovereignty and jurisdiction, encourage the optimum beneficial use of the river, its facilities and its waters, and remove all causes of controversy between said parties with respect to the location of the boundary between the states, and therefore, to settle and to terminate this dispute by agreement and compromise to the end of securing dismissal of this action, and submission of the boundary between the State of South Dakota and the State of Nebraska with respect to Rush Island in the future to a Joint State Boundary Commission.

2. In the furtherance of the best interests of each of the parties it is recognized that the land known as "Elk/Rush Island" subject of this lawsuit, is now, and has been, within the boundary of the State of Nebraska and subject to its jurisdiction.

3. The bill of complaint filed by the State of South Dakota in May 1976, initiating this action, should be dismissed without prejudice, each party bearing its own costs.

4. The State of South Dakota has agreed to cede to the Intervenors any right or title it may have in the subject property known as "Elk/Rush Island", more fully described in Appendix A attached to the Stipulation of Dismissal; and the State of South Dakota specifically recognizes the Judgment of the District Court of Cedar County, Nebraska, dated November 7, 1958, which quieted title to the above identified land in Clyde Gill and others, predecessors of the Intervenors, which action can be found in the records of Cedar County District Court of Nebraska, Case No. 5628, Docket 24, Page 13.

5. The State of South Dakota has further agreed to dismiss an action to quiet title filed in the Circuit Court of Yankton, South Dakota, regarding this subject property.

6. The States of Nebraska and South Dakota have agreed to submit the determination of the future boundary changes with regard to "Elk/Rush Island" but not to the title to the premises therein, to a Joint State Boundary Commission appointed by the elected officials of these respective states for the Commission's determination forth.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that pursuant to the above Stipulations and Findings:

(1) That the land known as "Elk/Rush Island" the subject of this litigation be and the same is within the boundary of the State of Nebraska and subject to its jurisdiction;

(2) That the State of South Dakota hereby cedes to the Intervenors any right or title it may have in the subject property known as "Elk/Rush Island" as more fully described in Appendix A, attached hereto;

(3) That the States of Nebraska and South Dakota will submit the determination of the future boundary changes, if any, with regard to "Elk/Rush Island" but not to the title to the premises thereto, to a Joint State Boundary Commission appointed by the elected officials of these respective states for the Commission's determination from the date of that determination forth;

(4) That the State of South Dakota and the State of Nebraska will proceed to effectuate any and all other requirements agreed to in the Stipulation to the extent that conditions and circumstances permit; and

(5) That the Bill of Complaint filed by the State of South Dakota against the State of Nebraska initiating this action be and the same is, hereby, dismissed without prejudice, each party bearing its own costs.

DATED this 22nd day of February, 1982.

/s/ Oren Harris
Master

THE STATE OF SOUTH DAKOTA, Plaintiff,

By /s/ Mark Meierhenry
Mark Meierhenry
Attorney General

THE STATE OF NEBRASKA, Defendant

By /s/ Paul L. Douglas
Paul L. Douglas
Attorney General

ROBERT J. FOLEY, Intervenor,

By /s/ Robert J. Foley

PHYLLIS K. FOLEY, Intervenor,

By /s/ Phyllis K. Foley

HELEN ISAAK, as executrix of the
Estate of OTTO ISAAK,

By /s/ Helen Isaak

By /s/ Everett A. Bogue
Everett A. Bogue
Attorney for Intervenors

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ROBERT J. FOLEY and PHYLLIS K. FOLEY, his wife as joint tenants and their survivor, and Helen H. Isaak as executrix of the estate of Otto Isaak, deceased,
Intervenors.

APPENDIX A

Rush Island in the Missouri River, said island being a part of Sections 5, 6 and 7, Township 33, Range 1, East, Cedar County, Nebraska, according to the original Government Survey and which is more fully and particularly described in the Surveyor's record No. 5, Page 70 as follows: Commencing at the Section corner of Sections 7 and 8, in Township 33, Range 1, East, Cedar County, Nebraska, as is located by the survey recorded in Surveyor's Record, Volume 4, page 29 of the records of Cedar County, Nebraska, thence running due north from this corner 5060 feet to the point of beginning, thence running 710 feet north 81 degrees east, thence 805 feet north, 68 degrees east, thence 942 feet

north 59 degrees east, thence 326 feet north 88 degrees east, thence 874 feet north 84 degrees east, thence 362 feet south 54 degrees east, thence 305 feet north 58 degrees east, thence 1140 feet north 65 degrees east, thence 1315 feet north 5 degrees east, thence 805 feet north 60 degrees west, thence 1800 feet north 69 degrees west, thence 1225 feet north 72 degrees west, thence 2080 feet north 79 degrees west, thence 1390 feet north 57 degrees west, thence 1160 feet north 86 degrees west, thence 582 feet south 84 degrees west, thence 1090 feet south 5 degrees west, thence 1980 feet south 89 degrees west, thence 688 feet south 47 degrees west, thence 1400 feet south 20 degrees west, thence 1415 feet south 55 degrees west, thence 865 feet south 78 degrees east, thence 588 feet south 87 degrees east, thence 2220 feet south 72 degrees east, thence 2530 feet south 78 degrees east, thence 1890 feet south 62 degrees east, thence 425 feet south 71 degrees east to the point of beginning, containing 994 acres more or less, all in Township 33, Range 1 East in Cedar County, Nebraska, and that intervenors are the record owners thereof.

GRA/cmb/w12

(Filed September 24, 1981. Judge Oren Harris, Master)

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

1975 No. 72, Original

STATE OF SOUTH DAKOTA,
Plaintiff,
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STATE OF NEBRASKA,
Defendant,
and
ROBERT J. FOLEY and PHYLLIS K. FOLEY, as joint tenants and their survivor and HELEN ISAAK as executrix of the estate of OTTO ISAAK, Deceased,
Intervenors.

STIPULATION FOR DISMISSAL

COMES NOW the parties, the State of South Dakota, the Plaintiff by and through its Attorney General, Mark V. Meierhenry; the State of Nebraska, Defendant, by and through its Attorney General, Paul L. Douglas; and the Intervenors by and through themselves personally and their Attorney, Everett A. Bogue, and hereby stipulate and agree:

1. It is in the best interests of each of the parties hereto to avoid litigation and multiple exercises of sovereignty and jurisdiction, encourage the optimum beneficial use of the river, its facilities and its waters, and remove all causes of controversy between said parties with respect

to the location of the boundary between the states, and therefore, to settle and to terminate this dispute by agreement and compromise to the end of securing dismissal of this action, and submission of the boundary between the State of South Dakota and the State of Nebraska with respect to this particular land (Rush Island) in the future to a Joint State Boundary Commission.

2. In furtherance of the best interests of all parties it is recognized that the land known as "Elk/Rush Island" subject of this lawsuit is now, and has been, within the boundary of the State of Nebraska and subject to its jurisdiction.

3. The bill of complaint filed by the State of South Dakota in May, 1976, initiating this action, should be dismissed without prejudice, each party bearing its own costs.

4. The State of South Dakota hereby cedes to the intervenors any right or title it may have in the subject property known as Elk/Rush Island, more fully described in Appendix A attached hereto and made a part hereof; and the State of South Dakota specifically recognizes the Judgment of the District Court of Cedar County, Nebraska dated November 7, 1958, which quieted title to the above identified land in Clyde Gill and others, predecessors of the intervenors, which action can be found in the records of the Cedar County District Court of Nebraska. (Case #5628, Docket #24, page 13.)

5. The State of South Dakota hereby agrees to dismiss an action to quiet title filed in the Circuit Court of Yankton, South Dakota regarding this subject property.

6. The State of Nebraska and the State of South Dakota will submit the determination of the future bound-

ary changes with regard to Elk/Rush Island, but not to the title to the premises therein, to a joint State Boundary Commission appointed by the elected officials of these respective states for the Commission's determination from the date of that determination forth.

Dated this 18 day of August, 1981.

THE STATE OF SOUTH DAKOTA,
Plaintiff

By: /s/ Mark V. Meierhenry
Mark V. Meierhenry
Attorney General

THE STATE OF NEBRASKA,
Defendant

By: /s/ Paul L. Douglas
Paul L. Douglas
Attorney General

ROBERT J. FOLEY, Intervenor

By: /s/ Robert J. Foley

PHYLLIS K. FOLEY, Intervenor

By: /s/ Phyllis K. Foley

HELEN ISAAK, as executrix of
the estate of OTTO ISAAK

By: /s/ Helen Isaak

By: /s/ Everett A. Bogue
Everett A. Bogue
Attorney for Intervenors

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east, thence 942 feet north 59 degrees east, thence 326 feet north 88 degrees east, thence 874 feet north 84 degrees east, thence 362 feet south 54 degrees east, thence 305 feet north 58 degrees east, thence 1140 feet north 65 degrees east, thence 1315 feet north 5 degrees east, thence 805 feet north 60 degrees west, thence 1800 feet north 69 degrees west, thence 1225 feet north 72 degrees west, thence 2080 feet north 79 degrees west, thence 1390 feet north 57 degrees west, thence 1160 feet north 86 degrees west, thence 582 feet south 84 degrees west, thence 1090 feet south 55 degrees west, thence 1980 feet south 89 degrees west, thence 688 feet south 47 degrees west, thence 1400 feet south 20 degrees west, thence 1415 feet south 55 degrees west, thence 865 feet south 78 degrees east, thence 588 feet south 87 degrees east, thence 2220 feet south 72 degrees east, thence 2530 feet south 78 degrees east, thence 1890 feet south 62 degrees east, thence 425 feet south 71 degrees east to the point of beginning, containing 994 acres more or less, all in Township 33, Range 1 East in Cedar County, Nebraska, and that intervenors are the record owners thereof.

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ROBERT J. FOLEY and PHYLLIS K. FOLEY, as joint tenants and their survivor and HELEN ISAAK as executrix of the estate of OTTO ISAAK, Deceased,
Intervenors.

MOTION TO DISMISS

COME NOW the parties, the State of South Dakota, the plaintiff by and through its Attorney General, Mark Meierhenry; the State of Nebraska, defendant, by and through its Attorney General, Paul L. Douglas; the intervenors by and through their attorney, Everett A. Bogue, and hereby move the Court to dismiss the action for the reason that a stipulation and agreement of settlement has been reached terminating this dispute between the parties,

such stipulation of settlement being attached hereto, marked Exhibit A and by this reference made a part hereof.

PHYLLIS K. FOLEY, Intervenor

By /s/ Phyllis K. Foley

HELEN ISAAK, as executrix of the estate of OTTO ISAAK

By /s/ Helen Isaak

By /s/ Everett A. Bogue
Everett A. Bogue
Attorney for Intervenors.

THE STATE OF SOUTH DAKOTA, Plaintiff

By /s/ Mark Meierhenry
Mark Meierhenry
Attorney General

THE STATE OF NEBRASKA, Defendant

By /s/ Paul L. Douglas
Paul L. Douglas
Attorney General

ROBERT J. FOLEY, Intervenor

By /s/ Robert J. Foley

EXHIBIT "A"

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Intervenors.

STIPULATION FOR DISMISSAL

COMES NOW the parties, the State of South Dakota, the Plaintiff by and through its Attorney General, Mark V. Meierhenry; the State of Nebraska, Defendant, by and through its Attorney General, Paul L. Douglas; and the Intervenors by and through themselves personally and their Attorney, Everett A. Bogue, and hereby stipulate and agree:

1. It is in the best interests of each of the parties hereto to avoid litigation and multiple exercises of sov-

ereignty and jurisdiction, encourage the optimum beneficial use of the river, its facilities and its waters, and remove all causes of controversy between said parties with respect to the location of the boundary between the states, and therefore, to settle and to terminate this dispute by agreement and compromise to the end of securing dismissal of this action, and submission of the boundary between the State of South Dakota and the State of Nebraska with respect to this particular land (Rush Island) in the future to a Joint State Boundary Commission.

2. In furtherance of the best interests of all parties it is recognized that the land known as "Elk/Rush Island" subject of this lawsuit is now, and has been, within the boundary of the State of Nebraska and subject to its jurisdiction.

3. The bill of complaint filed by the State of South Dakota in May, 1976, initiating this action, should be dismissed without prejudice, each party bearing its own costs.

4. The State of South Dakota hereby cedes to the intervenors any right or title it may have in the subject property known as Elk/Rush Island, more fully described in Appendix A attached hereto and made a part hereof; and the State of South Dakota specifically recognizes the Judgment of the District Court of Cedar County, Nebraska dated November 7, 1958, which quieted title to the above identified land in Clyde Gill and others, predecessors of the intervenors, which action can be found in the records of the Cedar County District Court of Nebraska. (Case #5628, Docket #24, page 13.)

5. The State of South Dakota hereby agrees to dismiss an action to quiet title filed in the Circuit Court of Yankton, South Dakota regarding this subject property.

6. The State of Nebraska and the State of South Dakota will submit the determination of the future boundary changes with regard to Elk/Rush Island, but not to the title to the premises therein, to a joint State Boundary Commission appointed by the elected officials of these respective states for the Commission's determination from the date of that determination forth.

Dated this 18 day of August, 1981.

THE STATE OF SOUTH DAKOTA,
Plaintiff

By: /s/ Mark V. Meierhenry
Mark V. Meierhenry
Attorney General

THE STATE OF NEBRASKA
Defendant

By: /s/ Paul L. Douglas
Paul L. Douglas
Attorney General

ROBERT J. FOLEY, Intervenor

By: /s/ Robert J. Foley

PHYLLIS K. FOLEY, Intervenor

By: /s/ Phyllis K. Foley

HELEN ISAAK, as executrix of the estate of OTTO ISAAK

By: /s/ Helen Isaak

By: /s/ Everett A. Bogue
Everett A. Bogue
Attorney for Intervenors

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END OF DOCKET